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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

ANTHONY SKIRLICK, *et al.*,

Petitioners,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent disagrees with the questions presented by Petitioners in the petition for certiorari. The questions presented are based on a totally flawed interpretation of the decision of the court below. The Court of Appeals did not grant sureties on Labor Organization Bonds required by the Labor-Management Reporting and Disclosure Act ("LMRDA") an absolute immunity "simply" because the union officials bonded by those sureties did not conceal the acts giving rise to liability under the bond. The Court of Appeals also did not hold that the notoriousness of such acts is a defense to liability under LMRDA § 502(a) for sureties who have bonded such union officials who commit such acts. Rather, the Court correctly considered the circumstances of the acts by the Professional Air Traffic Controllers Organization ("PATCO") officials bonded by Respondent as one of many factors in deciding that the acts alleged to constitute "fraud or dishonesty" in the handling of funds did not fall within the coverage of the Labor Organization Bond.

The attacks of Petitioners on the decision of the Court of Appeals are wholly without merit.

The questions presented for review are:

1. Whether Petitioners' allegations of the acts taken by PATCO officials in furtherance of the 1981 strike by PATCO members can fall within the definition of "fraud or dishonesty" in handling of funds, as that term is used by LMRDA § 502(a) and in the Labor Organization Bond written by Respondent.

2. Whether, in determining whether certain acts constitute "fraud or dishonesty" in the handling of funds, as that term is used by LMRDA § 502(a), the trier of fact may consider as a factor that the acts were open and notorious and supported by most of the parties ultimately to be protected by the Labor Organization Bond.

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INTRODUCTION

Respondent, Fidelity & Deposit Company of Maryland ("Fidelity"), by its counsel, pursuant to Rule 22 of the Supreme Court Rules, submits this brief in opposition to the petition for certiorari.

STATEMENT OF THE CASE

I. The Proceedings Below

Petitioners allege themselves to be members of the Professional Air Traffic Controllers Organization ("PATCO") who did not participate in the 1981 strike by the PATCO membership. Petitioners brought this action in the United States District Court for the District of Columbia against individual officers and directors of PATCO seeking damages they claim to have suffered resulting from that strike.

Additionally, Petitioners set forth one claim against Respondent Fidelity. Petitioners seek to recover under a Labor Organiza-

tion Bond, a type of fidelity bond, whereunder PATCO was the insured and Fidelity was the underwriter. This Labor Organization Bond was required by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 502(a), which requires labor organization officers who handle funds to be bonded to provide protection against loss by reason of acts of fraud or dishonesty.

Following discovery, Fidelity moved for summary judgment on four separate grounds. After extensive briefing by the parties and oral argument, on April 17, 1987, District Judge Stanley Sporkin granted summary judgment in favor of Fidelity.[1]

One of the grounds relied on by Judge Sporkin was that the alleged acts by the PATCO officers and directors in furtherance of the strike did not, as a matter of law, constitute "fraud or dishonesty" as that term is used in fidelity bonds.[2] On June 22, 1987, a final judgment in favor of Fidelity and certification under Federal Rule of Civil Procedure 54(b) were entered. Petitioners then appealed to the United States Court of Appeals for the District of Columbia Circuit.

On August 5, 1988, the Court of Appeals affirmed the grant of summary judgment in favor of Fidelity.[3] The Court of Appeals reached only one of the two grounds relied on by Judge Sporkin and agreed with the lower court that the alleged action by the bonded PATCO officers and directors in furtherance of the 1981

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[1] *Skirlick v. PATCO*, 659 F. Supp. 104 (D.D.C. 1987), *aff'd*, 852 F.2d 1376 (D.C. Cir. 1988); A at lla-19a.

[2] Judge Sporkin also found that Petitioners failed to comply with certain conditions precedent contained in the Bond. These conditions required that a detailed proof of loss be submitted within four months of the discovery of loss and that any action on the Bond must be filed within a year of the date of the discovery of the loss. Judge Sporkin found that these bond terms were enforceable and that Petitioners' delay in attempting to satisfy these conditions was unexcused.

Judge Sporkin did not reach the two other separate grounds advanced by F&D in favor of summary judgment, that is, that Petitioners lacked standing to bring a claim on the bond since the union's trustee in bankruptcy was the only proper party to do so and that Petitioners' prior notice of PATCO provisions for a sanctioned job action barred their claim on the Bond.

[3] *Skirlick v. Fidelity & Deposit Co. of Md.*, 852 F.2d 1376 (D.C. Cir. 1988); A at la-10a.

strike did not fall within the bond coverage as those acts did not constitute "fraud or dishonesty."

II. The 1981 PATCO Strike

Since the early 1970's, PATCO was the exclusive bargaining representative for air traffic controllers employed by the Federal Aviation Administration ("FAA"). In 1981, the then-existing collective bargaining agreement was due to expire. PATCO and the FAA reached a tentative agreement in June 1981, but that agreement was overwhelmingly rejected by the union membership. PATCO announced a strike deadline of August 3, 1981, and, on that date, PATCO struck the FAA. Over seventy per cent of the federally employed air traffic controllers walked off the job.[4]

The Government obtained restraining orders against the strike[5] and then contempt citations when the restraining orders were not followed.[6] Pursuant to an order of President Reagan,[7] some 11,000 striking air traffic controllers who did not return to work by 11:00 a.m. on August 5, 1981, were fired.[8]

III. Prior Proceedings by Petitioners

On November 25, 1981, PATCO filed a Petition for Reorganization in the United States Bankruptcy Court for the District of Columbia. Subsequently, Petitioner Hough and two others moved to intervene in the suit instituted by the United States against PATCO in response to the strike.[9] They maintained, as

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[4] *See PATCO v. FLRA*, 685 F.2d 547, 551 (D.C. Cir. 1982).

[5] *See, e.g., United States v. PATCO*, 524 F. Supp. 160 (D.D.C. 1981); *Graham v. PATCO*, 524 F. Supp. 160 (D.D.C. 1981).

[6] *See, e.g., United States v. PATCO*, 107 L.R.R.M. (BNA) 3210 (D.D.C. 1981) (civil contempt); *United States v. Phillips*, 527 F. Supp. 1361 (N.D. Ill. 1981) (criminal contempt). *But see United States v. PATCO*, 525 F. Supp. 820 (E.D. Mich. 1981) (civil contempt fines vacated after firing); *United States v. PATCO*, 524 F. Supp. 160 (D.D.C. 1981) (civil contempt order vacated after firing).

[7] *Air Traffic Controllers Strike*, 17 Weekly Comp. Pres. Doc. 845 (Aug. 3, 1981).

[8] *See PATCO v. United States Dep't of Transp.*, 529 F. Supp. 614 (D. Minn. 1982).

[9] Motion for Leave to Intervene, *United States v. PATCO*, Civil Action No. 81-1805 (D.D.C.).

they claimed in the action in the district court below, that the air traffic controllers who walked off the job could not be considered lawful members of PATCO. They sought a declaratory judgment to that effect and additionally asked the Court to find that only the air traffic controllers who did not walk off the job were the sole lawful members of PATCO. In addition, they sought leave to file a cross-claim against all but two of the individual defendants in that action which persons are among those named as individual defendants in the action below.

The Court ultimately considered on the merits the relief requested. In a memorandum order issued May 19, 1982, Judge Gasch denied the motion based on the applicants' failure "to advance their novel theories" in a timely fashion.[10]

In the interim, the applicants asserted their novel theories of relief in two other forums. On January 4, 1982, one filed a Complaint with the Assistant Secretary of Labor for Labor Management Relations. The Assistant Secretary dismissed the Complaint on February 3, 1982. [11] A request for reconsideration was not granted.[12]

In addition, on April 9, 1982, Petitioner Hough and the other two applicants brought an adversary action in the United States Bankruptcy Court for the District of Columbia. The Complaint named as defendants PATCO, Robert E. Poli, Robert Meyer, Michael Ferman, Gary W. Eads, Dominic Torchia, George W. Brandon, David Siegel, Charles Campbell, Larry Phillips, David Trick, and Dennis Reardon, who are all among the individual defendants in the instant action below. Fidelity was not named as a defendant. Once again, the applicants sought, *inter alia*, declaratory relief that they and others similarly situated were the only lawful members of PATCO; that the defendants be ordered to ac-

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[10] *United States v. PATCO*, Civil Action No. 81-1805, memorandum op. at 10 (D.D.C. May 19, 1982).

[11] *See* Exhibit 2 to Proposed Answer of Applicants for Intervention, Counterclaim, and Cross-Claim Against Original Individual Defendants Requesting Declaratory, Injunctive and Other Relief, *United States v. PATCO*, *supra*, n.9.

[12] *Id.*, Exhibit 3 thereto.

count for expenditures of union funds; and that monetary relief for alleged improper expenditures of union funds be awarded.[13]

The defendants filed a motion for summary judgment on July 13, 1982, and the plaintiffs filed a cross-motion for summary judgment. Following oral argument, by order dated December 22, 1983, the defendants' motion was granted and summary judgment was entered in their favor against the plaintiffs.[14]

On July 9, 1982, Petitioner Skirlick, as a purported representative of "the class of non-striking PATCO members during and/or after the illegal strike" filed a Proof of Claim in the PATCO bankruptcy proceeding in the sum of $130,000,000.00.[15] The grounds of liability were essentially the same claims asserted in Petitioners' Complaint below. At approximately the same time, Petitioners also submitted to the Bankruptcy Court a proposed Bankruptcy Court Complaint against PATCO, Gary Eades, Dominic Torchia, other members of the PATCO Board of Directors, and Fidelity.

On May 19, 1984, the PATCO Trustee in bankruptcy deemed the claim to be "unliquidated and unsubstantiated" and recommended that the claim be disallowed.[16] On June 28, 1984, Petitioners filed a Motion for Relief from Automatic Stay, seeking a modification of the automatic stay to allow them to file against PATCO the proposed complaint in "another forum." After oral argument, a consent agreement was entered into and approved by the Honorable George F. Bason, Jr., which, *inter alia*, provided:

- the claim was disallowed; and
- the Trustee abandoned, on behalf of the estate, any interest in the bond claim.

An order to this effect was entered on July 26, 1984. [17]

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[13] Complaint, *Hough v. PATCO*, Case No. 81-00656, Adv. Proc. No. 82-0093 (Bankr. D.C.C.).

[14] *Id.*, Order for Summary Judgment.

[15] Proof of Claim (#91), *In re PATCO*, Case No. 81-00656, (Bankr. D.D.C.).

[16] *Id.*, Objection to Claim No. 91 and Notice of Hearing.

[17] *Id.*, Order re Claim 91 and Motion for Relief from Automatic Stay Filed by Anthony J. Skirlick, Jr., *et al.*

Petitioners subsequently commenced the instant action below on August 1, 1984.

IV. The Labor Organization Bond Terms

Petitioners identified two Labor Organization Bonds, numbered 596-06-43-A and 596-06-43-B, as the bond or bonds on which they base their claim against Fidelity.[18] Bond No. 596-06-43A went into effect on September 22, 1977, and was cancelled on September 22, 1981, to be superceded or replaced by Bond No. 596-06-43-B.[19] For purposes of this petition, which of the bonds might cover the period when Petitioners' alleged loss arose need not be addressed, as both bonds have the same essential terms. They differ significantly only in the amounts of indemnity and in the identity of the scheduled insureds.[20]

The essential terms of the Bonds are as follows:

Bond 596-06-43-A names PATCO and certain subordinate locals as the "Insured."[21] Bond 596-06-43-B names PATCO as the "Insured."[22] The Bonds name Fidelity as "Underwriter."[23]

The Insuring Agreement in both Bonds was subject to a rider such that it provided:

> *The Underwriter,* in consideration of the payment of the premium, and subject to the Declarations made a part hereof, the General Agreements, Conditions and Limitations, and other terms of this bond *agrees to indemnify the Insured* in accordance with such of the Schedules as are specifically designated by the insertion of any amount of indemnity in Item 3 of the Declaration *against the loss of funds or other property which the Insured shall sustain* and discover as provided in Section 1 *through any fraudulent or dishonest acts committed by any Employees*, acting alone or in collusion with others,

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[18] A at 28a-29a.
[19] Quoted in A at 5a.
[20] *Id.*
[21] A at 29a-30a.
[22] A at 30a.
[23] *Id.*

> the amount of indemnity on each of such Employees being the amount of amounts stated in Schedule A, B and C, respectively, whichever is applicable to such Employees as provided in Section 7. [24]

This coverage for "fraud or dishonesty" was mandated by the 1965 amendments to the LMRDA. Although coverage for "faithful performance of duties" may have been available, as was required prior to the 1965 amendments, PATCO was aware that the Labor Organization Bond written by Fidelity would not provide this more broadly worded coverage.[25]

V. Petitioners' Allegations of "Fraud or Dishonesty"

In response to interrogatories propounded by Fidelity in the district court below, Petitioners set forth the actions that they contend constitute fraudulent or dishonest acts resulting in the loss of funds or other property by them or PATCO.[26] Essentially, Petitioners alleged that the individual defendants planned and organized the PATCO strike and utilized union funds in connection with or in support of the strike. In June 1985, in a supplemental answer to this interrogatory, Petitioners raised new allegations that some of the individual defendants excluded some members of PATCO (or their votes) to arrive at an eighty percent (80%) majority to ratify the strike. They further alleged that the individual defendants caused litigation to be constituted against certain PATCO members to force them to pay PATCO dues and fees and that these actions also constituted "fraudulent and dishonest acts."[27]

SUMMARY OF ARGUMENT

This case does not warrant review by this Honorable Court because there are neither special nor important reasons presented and because the decision below was not in error.

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[24] A at 32a (emphasis added).
[25] *See* at A at 18a.
[26] A at 37a-38a.
[27] A at 40a-41a.

Since 1981, Petitioners have pursued in a variety of forums their claims that they are entitled to damages or other relief against officers and directors of PATCO for their role in supporting the strike by the air traffic controllers. To date, every effort has been rebuffed.

The derivative claim made against Fidelity is equally meritless. The LMRDA requires a bond to protect against loss of union funds resulting from any "fraudulent or dishonest acts" in the handling of such funds by employees. Petitioners submit that the strike action was in violation of federal law and illegal and argue that acts in furtherance of the strike therefore fall within the coverage provided by the Labor Organization Bond required by the LMRDA and written by Fidelity.

From the outset of the litigation below, there was a substantial question whether the bond would provide coverage for such acts. Accordingly, it was agreed that this would be the initial matter to be decided by the Court. Petitioners set forth in response to interrogatories the acts which they contend fell under the bond. For purposes of the motion for summary judgment, these allegations were considered in the light most favorable to Petitioners. Both the District Court and the Court of Appeals concluded that the acts complained of were simply not the type which the Labor Organization Bond was intended to cover.

The LMRDA does not define what is meant by "fraudulent or dishonest" acts. Rather, the legislative history and the implementing regulations make it clear that trade usages and interpretations of similar bonds by state courts should be looked to. The facts giving rise to liability in those authorities are a far cry from the types of allegations raised by Petitioners. In addition, the interpretation of the phrase "fraudulent or dishonest acts," as that term is used in fidelity bonds, set forth by the Court of Appeals is wholly consistent with the guidance available from District of Columbia cases which have construed other similar fidelity bonds.

The Court of Appeals also relied upon two leading treatises on insurance law in coming to the conclusion it reached. Petitioners maintain that the Court should have decided the question as the District of Columbia Court of Appeals would have and they attack the propriety of the Circuit Court in referring to those

"secondary sources." It was appropriate for the Court of Appeals to consider these authorities because, on numerous occasions, the District of Columbia Court of Appeals has done so and presumably could have followed the same course had the issue been before it.

Petitioners also misconstrue or mischaracterize the basis of the decision by the Court of Appeals. While it properly considered that the PATCO leadership openly supported the strike, and further that the vast majority of the PATCO membership voted in favor of the strike, the Circuit Court did not "simply" conclude that this open or notorious nature of the officers' actions immunizes the surety on the bond from liability, as Petitioners contend. Rather, these facts were properly considered as one of many factors in determining that the acts did not constitute "fraud or dishonesty" under the guidelines of the LMRDA legislative history, the implementing regulations, District of Columbia case law, and other appropriate authorities.

The lack of any clear precedent evidences the uniqueness of the facts and issues in this case. It is unquestionable that there are no conflicts among lower courts to be resolved. Accordingly, neither the legal issue raised by Petitioners nor the specific facts presented are likely to be considered before other courts and there is no need for this Honorable Court to render a decision on a case of such limited significance. Indeed, even if a similar case were to arise, unless it was based on acts taking place in the District of Columbia and was thus governed by District of Columbia law, the courts below would look to their respective state law for the scope of the phrase "fraud or dishonesty" in the context of a fidelity bond. Thus, the petition should be denied for the reason that there are neither special nor important reasons to review the decision below, as well as for the reason that no error is presented.

ARGUMENT/REASONS FOR DENYING THE WRIT

I. This Case Does Not Merit Review Under Accepted Standards For Certiorari

This case meets none of the established criteria for certiorari. There are simply no special or important reasons to review the decision below.

It is not contended that there is a conflict between decisions of federal courts of appeals. Indeed, there are apparently no decisions whatsoever involving the scope of coverage of a fidelity bond required by LMRDA § 502(a), much less one where the acts giving rise to liability took place in the District of Columbia so that local D.C. law would govern.

Further, the factual nature of the claims by Petitioners is without precedent. Petitioners have not cited to a single case where actions in furtherance of an illegal strike were found or even asserted to constitute "fraud or dishonesty" within the meaning of a fidelity bond required by LMRDA § 502(a), much less a bond that was not prescribed by statute. This fact is reflective of the novel, but meritless, nature of Petitioners' claims and buttresses the correctness of the courts below in dismissing those claims.

Not only did the PATCO Trustee in bankruptcy consider Petitioners' related claims to be "unsubstantiated" and Judge Gasch characterize Petitioners' theories as "novel," there is no reported case law involving even remotely similar facts. Rather, the few reported cases involving claims under bonds required under LMRDA § 502(a) are based on allegations that the bonded union officers misappropriated union funds for their own benefit or for the benefit of friends or relatives.[28] As Fidelity contended and the Court of Appeals (and the District Court) agreed, unlike the instant claim, that fact pattern is the archetypical situation which a fidelity bond is intended to address. The very different claim made by Petitioners under the PATCO bond is unique and thus is unlikely to reoccur.

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[28] *See, e.g., Giordani v. Hoffman*, 295 F. Supp. 463, 467 (E.D. Pa. 1969).

While Fidelity believes Petitioners' claim under the bond to be unique for the reason that it is no more than an imaginative, but meritless, effort to find the proverbial "deep pocket" defendant, it cannot be denied that there is no evidence that the concerns raised by Petitioners, if the decision below stands, have been a source of concern to anyone else. The errors claimed by Petitioners are, at best, episodic[29] and are unlikely to reoccur.[30] As such, the issues raised by Petitioners are not important questions of federal law which should be decided by this Honorable Court.

Alternatively, for purposes of deciding whether this case merits review by this Court, there would have to be a conflict between the United States Court of Appeals for the District of Columbia Circuit and the District of Columbia Court of Appeals on some federal question. The Court of Appeals decision below would be precedent for interpreting the scope of Labor Organization Bonds required by federal statute--which is a federal question. It would not, however, be binding precedent on the local District of Columbia courts in interpreting the scope of a bond with the same language, but which bond is not required by federal law--which is a question of local law.

Conversely, the District of Columbia local courts have never had occasion to address the scope of bonds required by LMRDA. Indeed, it is unlikely, although not impossible, that the local District of Columbia courts would ever have occasion to consider such a question in light of the various statutes granting the federal district courts original jurisdiction over claims made under bonds required by LMRDA § 502 (a).[31]

Thus, there is no decision either of the District of Columbia Court of Appeals or of another federal court of appeals on the question of federal law raised herein. Accordingly, it cannot be said that there is a conflict with the decision of the Court of Appeals for the District of Columbia Circuit to be resolved.

Finally, it should be recognized that the decisions below are extremely fact-dependent. Indeed, the issue of what acts con-

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[29] *Cf. United States v. Zacks*, 375 U.S. 59, 61 (1963).

[30] *Cf. Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

[31] *See* 28 U.S.C. §§ 1331, 1337, 1352.

stitute "fraud or dishonesty" under a fidelity bond will invariably depend on the specific facts before the Court. No rule of far-reaching application was created. Rather, the Court of Appeals (and the District Court) applied the broad general guidelines considered by other courts to the specific allegations before it. In reality, Petitioners simply disagree with the conclusions reached. This Honorable Court need not and should not superimpose its judgment as to the merits of the particular claims made in this case for the considered decisions below.

For the reasons set forth above, this case presents neither special nor important reasons to grant review on writ of certiorari.

II. No Error By The Court Of Appeals Is Presented

A. The Determination That the Acts in Support of the PATCO Strike Did Not Constitute "Fraud or Dishonesty" Was Decided Under the Appropriate Standards

The Court of Appeals found that the acts by the bonded PATCO officers in support of the 1981 strike did not constitute "fraud or dishonesty" relating to the handling of funds. The legislative history of Section 502(a) of the LMRDA which required the bond in the first instance, the Department of Labor regulations implementing these requirements, and District of Columbia case law interpreting language similar to "fraud or dishonesty" in the context of fidelity bonds all support this conclusion.

When the LMRDA was originally enacted in 1959, Section 502(a) required every officer to be bonded for the "faithful discharge of his duties." Pub. L. No. 86-257, § 502, 73 Stat. 536 (1959). In 1965, partially due to the uncertainty of that phrase and the corresponding higher premium charged by sureties to cover the broader risk, the LMRDA was amended to require a bond to protect against loss by reason of acts of "fraud or dishonesty." Pub. L. 89-216, § 1, 79 Stat. 888, amending 29 U.S.C. § 502(a). In adopting this requirement, Congress was clearly looking to and requiring the coverage afforded by similar extant bonds offered by insurance companies.[32]

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[32] *See* S. Rep. No. 698, 89th Cong., lst Sess. ____, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3248, 3249 (The honesty bond which would be required . . . is

Furthermore, the Department of Labor regulations implementing the bonding requirements of the LMRDA also recognize that Congress had "a clear awareness of trade usages and terminology in this field." 29 C.F.R. § 453.18(a). *See also* 29 C.F.R. § 453.12 (referring to other bonds providing protection against "fraud or dishonesty" for interpretation of that term).

The Department of Labor regulations, implementing the bonding requirements of LMRDA § 502 (a), amplified the meaning of "fraud or dishonesty."

> The term "fraud or dishonesty" shall be deemed to encompass all those risks of loss that might arise through dishonesty or fraudulent acts in handling of funds as delineated in §§ 453.8 and 453.9. As such, *the bond must provide recovery* for loss occasioned by such acts *. . ., provided that within the law of the state in which the act is committed, a court would afford recovery under a bond providing protection against fraud or dishonesty. As usually applied under state law, the term "fraud or dishonesty" encompasses such matters as larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wrongful conversion, willful misapplication or any other fraudulent or dishonest acts resulting in financial loss.*

29 C.F.R. § 453.12 (emphasis added). Thus, interpretations under District of Columbia law of the coverage provided by bonds insuring against "fraud or dishonesty" do provide great guidance in establishing the scope of the bond herein.

District of Columbia case law reveals that fidelity bonds insuring against losses incurred "through any fraudulent or dishonest act or acts," are generally recognized to protect against losses

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the same type of bond which has been used by corporations, banks, and other financial institutions and has proven effective and adequate.") (statement of Secretary of Labor Wirtz); H. Rep. No. 182, 89th Sess. 1st Sess. 2 (1965) ("We ought to have a simple honesty bond of the type which is exacted with respect to all banks, various financial trusts, and which has been found effective and adequate on handling of funds in other cases in a businesslike way . . . .") (statement of former Secretary of Labor Goldberg).

resulting from some concealed misappropriation, not simply misuse, involving the insured's assets. *See, e.g., Imperial Ins., Inc. v. Employers' Liab. Assurance Corp.*, 442 F.2d 1197 (D.C. Cir. 1970) (the insured made a claim for losses incurred under insurance policies written, but not disclosed, by its general manager). *See also Fidelity & Deposit Co. of Md. v. President and Directors of Georgetown College*, 483 F. Supp. 1142, 1144 (D.D.C. 1980) (claim that employee illicitly diverted NIH grant funds to private research).

The paradigmatic fidelity bond claim involves an employee who makes off with assets of the employer. *See, e.g., Alexandre of London, Washington, D.C. Corp. v. Indemnity Ins. Co. of N. Am.*, 183 F. Supp. 715 (D.D.C. 1960).

More generally, under District of Columbia law, it has been held that

> "For an act to be 'dishonest' within the meaning of a fidelity suretyship bond, there must exist the element of moral turpitude or want of integrity." . . . [I]n order to show personal dishonesty within the meaning of a fidelity clause, there must be both "a want of integrity and an intentional breach of trust." . . . In other words, there must exist a compelling sense of conscious wrong rather than a mere omission or act amounting to negligence.

Sade v. National Surety Corp., 203 F. Supp. 680, 684 (D.D.C. 1962), *aff'd*, 314 F.2d 286 (D.C. Cir. 1963).

Similarly, in *Imperial Ins., Inc. v. Employers' Liab. Assurance Corp., supra*, it was held that a fidelity policy covers losses sustained "through any fraudulent or dishonest act or acts committed by any of the Employees, acting alone or in collusion with others." *Id.*, 442 F.2d at 1202.

Fraud, of course, requires a false representation of material fact, made with knowledge of its falsity, with intent to deceive, and action taken in reliance on the representation. *See, e.g., Higgs v. Higgs*, 472 A.2d 875, 876 (D.C. App. 1984); *Urban Invs., Inc. v. Branham*, 464 A.2d 93, 98 (D.C. App. 1983).

Petitioners' allegations herein simply do not rise to the level of fraud or dishonesty by the officers of PATCO in connection with the handling of funds. Essentially, as the cases cited indicate, the bond is intended to protect against the loss of union assets through acts in the nature of defalcation. *Cf.* 29 C.F.R. § 453.12 (setting forth specific types of acts constituting "fraud or dishonesty": larceny, theft, embezzlement, *etc.)*.

The claimed losses herein are not related to any defalcation by PATCO officers. Petitioners complain primarily of the loss of future negotiating rights and salary as well as the loss of union assets as a result of the PATCO bankruptcy proceeding and claims and judgments therein. The bonding requirement, however, "relates only to duties . . . in connection with . . . handling of funds or other property. . . ." 29 C.F.R. § 453.11. It cannot even be claimed that these claimed damages were incurred in connection with handling of the union assets.

To the extent such vague allegations were made, *i.e.*, spending of funds by PATCO officers in support of the PATCO strike, they do not involve a defalcation, do not involve deceit, and thus cannot be said to constitute fraud or dishonesty in the handling of those funds.

Finally, Petitioners also make claim for the loss of union assets based generally on an alleged breach of fiduciary duty in supporting the PATCO job action. It is manifestly clear, as the lower courts found, that the bond required by Section 502(a) does not cover every breach of fiduciary duty by labor organization officials, as set forth in Section 501(a) of the LMRDA.

Both the House and Senate Reports on the 1965 amendments to the LMRDA explained:

> The question has been raised . . . whether or not the fraud or dishonesty bond would adequately cover the violations of section 501(a) of the act. Solicitor of Labor Charles Donahue . . . presented the well-considered views of the Labor Department favoring the bill and the proposed substitution of bonds. He states that it is and has been the position of the Department that *the bond required by section 502(a) need not cover all*

> *violations of section 501(a)*. This position is expressed in an interpretative bulletin . . . which states in part:
>
> "*The bonding requirement in section 502(a)* relates only to duties of the specified personnel in connection with their handling of funds or other property to which this section refers. It *does not have reference to the special duties imposed upon representatives of labor organizations by virtue of the position of trust which they occupy*, which are dealt with in section 501(a), and for which civil remedies for breach of the duties are provided in section 501(b). *The fact that the bonding requirement is limited to personnel who handle funds or other property indicates the correctness of these conclusions*. They find further support in the differences between sections 501(a) and 502(a) of the act which sufficiently indicate that the scope of the two sections is not coextensive."
>
> *The committee endorses the soundness of that interpretation*.

H. Rep. No. 182, 89th Cong. lst Sess. 4; S. Rep. No. 698, 89th Cong., lst Sess.___, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3248, 3250-51 (emphasis added). *Accord* 29 C.F.R. § 453.11.

While there is language in the legislative history of the 1965 change indicating that the scope of a bond covering "fraudulent or dishonest acts" would not have a "substantial difference" from a bond covering "faithful discharge of duties,[33] that language also makes it clear that bonding companies were concerned with the greater ambiguity inherent in the latter term.[34]

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[33] Petitioners' Petition at 3, n.1.

[34] The language cited by Petitioners, moreover, only represents the individual view of Senator Winston L. Prouty who would have amended Section 502(a) to provide, "in addition to the requirement that [union officials] provide protection against loss by reason of fraud or dishonesty . . . to also provide protection against loss . . . 'by reason of . . . failure to exercise that degree of due diligence normally required of a fiduciary or a trustee in his handling of such funds or property . . . .'" S. Rep. No. 698, 89th Cong. lst Sess., Supplemental Views, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3248, 3255.

The fact is, of course, that mandated broader coverage for any fiduciary breach of duty was considered and rejected. Congress simply did not require it. Further, as found by the District Court, PATCO did have the option of obtaining a "faithful discharge of duties" bond with its potentially broader coverage and chose not to do so.[35]

Thus, whether or not Petitioners have a remedy against the individual defendants for a breach of fiduciary duty, they have no claim under the bond for the alleged breach of such duty. While Petitioners would have the courts rewrite the bond to cover such claims, it would be improper to do so, particularly in light of PATCO's deliberate decision to forego a broader bond for the faithful discharge of duty coverage afforded therein. Rather, the scope of the bond must be limited to that of other fidelity bonds insuring against acts of fraud or dishonesty by officers responsible for the handling of funds, as intended by Congress.

The decision of the Court of Appeals is entirely consistent with the foregoing authorities. It cited the District of Columbia Court of Appeals in noting that terms of an insurance policy are to be construed to reflect "the understanding of the ordinary person, that is to say . . . the meaning that common speech imparts."[36] The meaning accorded to the term "fraud or dishonesty" in the context of a fidelity bond by the Court of Appeals, moreover, is wholly consistent with the guidelines offered by District of Columbia courts in construing fidelity bonds not required by federal statute, as well as with the intent behind the LMRDA manifested by its legislative history and the implementing regulations.

Petitioners attempt to find significant error in the fact that the Court of Appeals cited to "secondary 'hornbook' authorities." They argue that other provisions of District of Columbia law should have been cited instead.

The provisions of D.C. law referred to by Petitioners are completely unrelated to either the ordinary common sense definition or the trade usage meaning of "fraud or dishonesty," as recognized by the courts. In citing to such diverse authorities as the

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[35] A at 18a.
[36] A at 6a.

Uniform Fiduciaries Act of the District of Columbia, the common law tort of conversion, and a District of Columbia code provision related to real estate transactions, Petitioners seek to bootstrap into a definition of "fraud or dishonesty" which Congress and the Department of Labor clearly did not intend in requiring a bond and which the surety could not anticipate in issuing it.

Nevertheless, Petitioners attack the Court of Appeals for referring to insurance law treatises such as *Couch on Insurance* and Appleman, *Insurance Law and Practice*. On numerous occasions, however, the District of Columbia Court of Appeals has itself cited and relied on these well-respected treatises in interpreting insurance policies and, in particular, in construing specific terms appearing in such policies.

For example, in *Western Exterminating Co. v. Hartford Accident & Indem. Co.*, 479 A.2d 872, 875 (D.C. App. 1984), Section 44:286 of *Couch on Insurance* is exclusively cited for determining whether certain events qualified as an "accident," as "that term is used in the general liability insurance policy here . . .."[37] Similarly, in *Streule v. Norfolk & Dedham Mut. Fire Ins. Co.*, 264 A.2d 296, 297 n.2 (D.C. App. 1970), Section 3267 of Appleman, *Insurance Law and Practice,* is the exclusive source cited for a definition of the "term 'perils of the sea' as used in a marine policy."[38]

It is thus hard to comprehend Petitioners' insistence that the Court did not look to the interpretation of "fraud or dishonesty" that would have been made by the local courts. Petitioners' position is particularly ironic in light of their reliance on decisions from other jurisdictions such as Pennsylvania and Illinois.[39]

Petitioners are equally inconsistent in arguing that the Court should make its ruling based on how District of Columbia courts would construe a "fraud or dishonesty" bond, while they seek to

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[37] *See also Young v. Firemen's Ins. Co. of Washington, D.C.*, 463 A.2d 675, 676 (D.C. App. 1983) (Section 28.14 of *Couch on Insurance* is primary source for definition of "legal representative" as that term is used in a fire insurance policy).

[38] *See also S. Freedman & Sons, Inc. v. Hartford Fire Ins. Co.*, 396 A.2d 195, 198 (D.C. App. 1978) (Sections 7381 and 7384 of Appleman, *Insurance Law and Practice*, cited for guidelines in interpreting the phrase "the following offenses . . . false arrest . . . or malicious prosecution" in an insurance policy).

[39] *See* Petitioners' Petition at 13-14, 17-18.

rely on the general language of the provisions of LMRDA as set forth in Sections 401 and 501(a). Ultimately, the general policy statement of Section 401 and certainly the fiduciary obligations established by Section 501(a) are simply unrelated to the specific bonding requirements of Section 502(a), as the legislative history cited above makes explicitly clear.

As set forth under the correct guidelines, discussed above, as well as under the definition adopted by the Court of Appeals, Petitioners' allegations of wrongdoing by the bonded PATCO officers do not qualify as "fraud or dishonesty" within the meaning of the Labor Organization Bond written by Fidelity. It was therefore correct for the District Court to dismiss the claim on the bond and for the Court of Appeals to affirm.

B. It was Not Error to Consider That the Acts Were Open and Notorious and Sanctioned by the PATCO Membership

Petitioners argue that the Court of Appeals sustained the grant of summary judgment in favor of Fidelity "simply because the union officials . . . have *not concealed* acts of intentional and flagrant" fraud or dishonesty . . . ."[40] Little could be further from the truth.

Rather, the Court of Appeals had before it, as does this Honorable Court, the alleged acts of "fraud or dishonesty."[41]

After discussing the definition of "fraud or dishonesty," the Court held:

> The actions of PATCO officials in appropriating funds for the 1981 strike, which was supported by most of the union membership, do not reflect a corrupt intent to deceive or to defraud the membership; nor do they reveal a breach of financial integrity, as would be the case if larceny, theft or embezzlement of PATCO funds was involved. Therefore, the bond does not protect PATCO against the kind of conduct of which appellants complain.[42]

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[40] Petitioners' Petition at i (emphasis in original). *See also id.* at 11-13.

[41] A at 5a-5b, 37a-38a, 40a-41a.

[42] A at 6a-7a.

Quite clearly, the Court of Appeals mentioned the fact that the union strike was supported by the union membership. This fact cannot seriously be viewed, however, as dispositive. Based on all the allegations made, the Court concluded that there was no "corrupt intent" nor a breach of "integrity." These are precisely the standards looked to in the decision in *Sade v. National Surety Corp., supra,* which Petitioners have submitted provides the proper criteria.

To the extent that the membership supported the strike or the fact that the PATCO officers did not conceal their support for the strike was considered in coming to the conclusion that the acts complained of were not "fraud or dishonesty" within the meaning of the bond, it was thus appropriate to do so. For example, the definition of fraud recognized by either the ordinary person and/or District of Columbia case law requires that there be a false representation or intent to deceive, as well as detrimental reliance.

There was no reliance on any misrepresentations. The air traffic controllers were almost certainly aware of the illegality of their action before they struck. Most certainly after President Reagan's announcement on August 3, 1981, they were aware of the consequences. It is hard to understand how Petitioners might claim that any deception or stealth was engaged in by the PATCO officers in connection with their handling of union assets. All the actions and the consequences thereof were apparent when they were made and approved of by a majority of the PATCO membership.

Petitioners are attempting to classify the will of the majority of their voluntary association as "fraud or dishonesty" by the officers. Rather, it should be recognized that, in such an organization, the "majority rules" and Petitioners may not now be heard to complain of the authorized acts of their duly-authorized representatives. *Cf. Pattern Makers' League of N. Am. v. NLRB,* 473 U.S. 95 (1985) (the right to resign during a strike protects the employee whose views come to diverge from those of his union). It simply cannot be concluded that there was "misrepresentation," much less "fraud or dishonesty," to the membership.

Petitioners have attempted to bring a claim under the Labor Organization Bond that is simply miles away, conceptually, from

the protection that Congress intended in requiring a bond insuring against fraud or dishonesty in the handling of union property. As the actions complained of do not constitute such acts, the PATCO bond does not provide coverage, and summary judgment was properly entered and affirmed in favor of Fidelity on that ground.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 5, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief of Respondent in Opposition to Petition For A Writ Of Certiorari this 5th day of December, 1988, by depositing three copies in the United States mail, with first-class postage prepaid, addressed to the following counsel of record:

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